

United States Court Of Appeals

NINTH CIRCUIT

HOWARD P. CARROLL and H. CARROLL & CO.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

Appeal from the United States District Court for the
Southern District of California,
Central Division

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 18551

HOWARD P. CARROLL and H. CARROLL & CO.,

Appellants,

vs.

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PETITION FOR REHEARING

TO THE HONORABLE

CIRCUIT JUDGE BARNES,
CIRCUIT JUDGE DUNIWAY, and
DISTRICT JUDGE PENCE.

Appellants, Howard P. Carroll and H. Carroll & Co., hereby petition for a rehearing to reconsider the judgment entered in this action on December 10, 1963, on the following grounds:

1. This Court has declared that the admission of Exhibit 2 (Fleishchell's letter to the Securities and Exchange Commission) was error, but has declared that the admission of the said Exhibit was not prejudicial error (Opinion, pp. 9 and 10).

2. This Court has further held that it was error to admit Exhibit 105 (Sillick's summary of Exhibit 22 and the records of the Nevada Transfer Agency (Exhibits 28, 29, 30 and 31)),

insofar as Exhibit 105 related to the Wisda and Johnson counts of the indictment (Opinion, pp. 10 and 11).

3. The Bloemsma count of the indictment must also be considered as not supported by evidence when the record is considered. The Assistant United States Attorney admitted that Arnold Bloemsma had no present recollection of any representation of any kind and no testimony was offered to support the Bloemsma sale (Tr. 600).

4. Prejudice to the Appellants from the admission of Exhibit 22 appears because defense counsel could not properly cross-examine Sillick as to Exhibit 105 without knowing the basis upon which he made his summary.

5. The effect of the admission of Exhibit 105 on the jury can only lead to speculation. Exhibit 27 (receipts signed by an employee of H. Carroll & Co. acknowledging delivery of stock to that company from Securities Transfer Corp.) cannot supply the missing link in the preparation of Exhibit 105 when Exhibit 22 is lost, for Exhibit 27 merely establishes the receipt of shares of stock of Comstock, Ltd. without establishing the previous owner of such shares. Previous ownership in itself, as established by Exhibits 28, 29, 30, and 31, is without significance or effect when no right can be established, in the absence of Exhibit 22, to purchase particular shares from

particular persons at established prices. Actual purchases are especially insignificant and bear on the inadmissibility of Exhibit 105 when considering time lapse between deliveries and subsequent sales of shares, regardless of their source, purchase price, or sales price.

6. At the time Exhibit 105 was offered, the Court questioned the Assistant United States Attorney about the purpose of Exhibit 105, and the following colloquy (Tr. 744) shows the keynote quality of Exhibit 105:

"THE COURT: Well, counsel, I -- what's the purpose of this chart? [Ex. 105.]

"MR. MITCHELL: To show the origin of the stock purchased by the investor witnesses named in the six counts and the two other investor witnesses who have testified at this trial.

"THE COURT: Do you have to do that by chart?

"MR. MITCHELL: Yes, your Honor.

"THE COURT: Why? Doesn't the record itself show it?

"MR. MITCHELL: No, your Honor, it does not trace it, the stock cannot be traced back to the particular shares shown in Exhibit 22 on the record alone.

"THE COURT: Wait a minute, counsel. Are you saying that -- you have marched yourself right into a trap that I am afraid you will never get out of. Are you saying that this witness is going to present evidence that is not in this case?

"MR. MITCHELL: No, I'm saying that it is not possible

7. In order to prepare Exhibit 105, Howard Sillick admitted that Exhibit 22 was used (Tr. 747), information was obtained from Ziering (Tr. 765), and that additional information was obtained by Sillick after inquiry was made by letter to the Nevada Transfer Agency (Tr. 772).

8. The trial judge noted that Exhibit 105 was prepared from matters not in evidence, and the witness, Howard Sillick, was instructed to take the biggest pencil he could find and mark out the transaction that related to his letter inquiry to the Nevada Transfer Agency (Tr. 774). No part of Exhibit 105 was ever stricken by Howard Sillick.

9. The record relating to Exhibit 105 establishes that all of the court's comments and the testimony relating to matters not in evidence were presented to the jury (Tr. 745).

10. If Exhibit 22 was improperly admitted, the admission of any other Exhibit, such as Exhibit 105, which depended on Exhibit 22 for its foundation, must necessarily be error as to all counts.

11. The prejudicial nature of the error also appears from the fact that Exhibit 105, as admitted, gave a badge of authenticity to Exhibit 22.

12. To allow one part of an exhibit to stand after part of the exhibit has been made known to the jury is difficult, if

It is respectfully submitted that this Court, in considering the numerous errors complained of, has recognized the problems which confronted the Appellants' defense counsel, and that the cumulative effect of the errors complained of was such that the conviction, sentences and fines imposed on both Appellants as to the counts this Court has upheld should be set aside and a new trial ordered as to those counts.

Undersigned counsel certify that this petition is not interposed for delay and that in their judgment it is well founded.

Dated: January 3, 1964.

Respectfully submitted,

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